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FILED
Clerk of the Superior Court

JAN 11 2007

By: K SANDOVAL, Deputy

12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF SAN DIEGO

15 ROBERT WILKINSON, individually,

16 Plaintiff,

17 v.

18 HOMESTAT FARM, LTD., an Ohio Limited
19 Liability Company, and Does 1 through 10,
20 inclusive,

20 Defendants.

Case No. GIC864017

[PROPOSED] CONSENT JUDGMENT

22 1. INTRODUCTION

23 1.1 On or about December 6, 2005, plaintiff ROBERT WILKINSON ("Wilkinson"),
24 provided a 60-day notice of violation ("Notice") to the California Attorney General, the District
25 Attorneys of every county in California, the City Attorneys of every California city with a
26 population greater than 750,000, and defendant HOMESTAT FARM, LTD. ("Homestat"),
27 alleging that Homestat, through sales in California of its Wheatena brand cereal ("Covered
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[PROPOSED] CONSENT JUDGMENT

San Diego Superior Court Case No. Case No. GIC864017

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LLP

Product”), was in violation of certain provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code sections 25249.5, et seq. (“Proposition 65”), by knowingly and intentionally exposing persons to acrylamide, a chemical known to the State of California to cause cancer, without first providing a clear and reasonable warning.

1.2 On or about April 7, 2006, Wilkinson, acting in the public interest pursuant to Health and Safety Code section 25249.7(d), filed a Complaint for Civil Penalties, Statutory, Equitable and Injunctive Relief in San Diego County Superior Court, Case No. GIC864017 (“Complaint”) against Homestat based on the allegations contained in the Notice.

1.3 For purposes of this Consent Judgment, Wilkinson and Homestat stipulate that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over Homestat as to the acts alleged in the Complaint, that venue is proper in the County of San Diego and that this Court has jurisdiction to enter this Consent Judgment as a full and final settlement and resolution of the allegations contained in the Complaint and of all claims which were or could have been raised based on the facts alleged therein or arising therefrom.

1.4 Wilkinson and Homestat enter into this Consent Judgment pursuant to a full and final settlement of disputed claims between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not constitute an admission with respect to any allegation made in the Notice or the Complaint, each and every allegation of which Homestat denies, nor may this Consent Judgment or compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Homestat. This Consent Judgment does not constitute a judicial finding of a statutory duty or obligation by Homestat to warn consumers, the liability for which Homestat contests. In addition, this Consent Judgment does not constitute an admission regarding the authority, or lack thereof, of any administrative agency, state or federal, regarding the implementation of Proposition 65.

2. INJUNCTIVE RELIEF: WARNING; WITHDRAWAL FROM CALIFORNIA

2.1 Compliance Date. For purposes of this Consent Judgment, the “Compliance Date” shall be the earliest of the following dates:

- 1 (a) the date Proposition 65 is preempted by federal law with respect to
2 warnings concerning the presence of acrylamide in the Covered Product,
3 or Proposition 65 warnings concerning the presence of acrylamide in the
4 Covered Product are determined to be in conflict with mandatory federal
5 food labeling requirements whether by statute, regulation, executive
6 action, or judicial decision ("Preemption");
- 7 (b) the date a "no significant risk level" ("NSRL") applicable to acrylamide in
8 the Covered Product that is different from the NSRL now published at
9 Title 22, California Code of Regulations section 12705(c)(2), is
10 promulgated by statute, final regulatory action, or final judicial decision
11 ("Alternative NSRL Promulgation"), thereby allowing for a determination
12 as to whether the Covered Product is exempt from a Proposition 65
13 warning ("Warning Exempt") pursuant to the Alternative NSRL
14 Promulgation and Health and Safety Code section 25249.10;
- 15 (c) December 31, 2007 ("Default Date").

16 2.2 Compliance Obligation.

- 17 (a) If the Compliance Date is determined under Paragraph 2.1 either:
18 (1) as a result of Preemption, or
19 (2) as a result of Alternative NSRL Promulgation, and the Covered
20 Product is Warning Exempt,
21 then the remainder of Paragraph 2 shall not apply to the Covered Product,
22 and Homestat shall be deemed in compliance with Proposition 65 with
23 respect to the Covered Product.
- 24 (b) If the Compliance Date is determined under Paragraph 2.1 either:
25 (1) to be the Default Date, or
26 (2) as a result of Alternative NSRL Promulgation, and the Covered
27 Product is not Warning Exempt,

1 then the remainder of Paragraph 2, including the warning requirement of
2 Paragraph 2.3, shall be applicable to the Covered Product.

3 2.3 Content of Warning. If required under Paragraph 2.2, the following warning
4 (“Acrylamide Warning”) shall accompany the Covered Product in California unless Homestat
5 takes the Withdrawal Actions specified in paragraph 2.5:

6 **WARNING:** Because Wheatena is made of toasted wheat, it
7 contains acrylamide, a chemical known to the State of California to
8 cause cancer. Acrylamide is formed when starchy food, including
9 wheat, is baked, toasted, roasted, or fried. Wheatena, as well as many
10 other cereals and other foods, contains acrylamide. Given what is
11 currently known about exposures to acrylamide in foods, the U.S.
12 Food and Drug Administration (FDA) advises consumers to continue
13 to eat a balanced diet, choosing a variety of foods that are low in trans
14 and saturated fat and rich in high-fiber grains, fruits and vegetables.
15 For more information, visit the following websites:
16 WWW.OEHHA.CA.GOV OR WWW.FDA.GOV

17 The word “WARNING” shall be in capital letters and bold typeface. The warning shall be
18 affixed to or printed on the back of the package of the Covered Product, in typeface equal to the
19 typeface of other product information on the label so as to render the warning easily read and
20 understood by an ordinary individual under customary conditions of purchase or use. Such
21 warnings shall accompany the Covered Product sold into California beginning no later than six
22 (6) weeks after the Compliance Date, and shall continue to accompany the Covered Product as
23 long as the Covered Product is sold to consumers in California, subject to the modifications
24 specified in Paragraph 2.4 and/or 2.6.

25 2.4 Modification of Warning Language. The Acrylamide Warning language specified
26 in Paragraph 2.3 may be modified, if necessary, upon approval of the California Attorney
27 General, to meet objections raised by the FDA or other governmental agencies. Any such
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1 modification shall be presented to the Court for approval before implementation.

2 2.5 Withdrawal Alternative. If Homestat declines to provide the Acrylamide Warning
3 to the extent required by Paragraphs 2.2 and 2.3, Homestat shall instead take the following
4 actions ("Withdrawal Actions") within six (6) weeks of the Compliance Date:

5 (a) Cease shipping the Covered Product to retailers and other vendors in
6 California; and

7 (b) Issue a notice to each of Homestat's retailers and other vendors in
8 California, that the Covered Product will not be sold into California.

9 Homestat shall notify Wilkinson, and shall also notify the Office of the Attorney General (mailed
10 care of Deputy Attorney General Edward G. Weil, California Department of Justice, 1515 Clay
11 Street, 20th Floor, Oakland, CA 94612) of any decision to take the Withdrawal Actions no later
12 than four (4) weeks after the Compliance Date. Withdrawal from the market in this manner
13 would be undertaken at Homestat's discretion.

14 2.6 Removal of Warning. Homestat shall no longer be required to provide the
15 Acrylamide Warning pursuant to Paragraphs 2.2 and 2.3, to the extent that any of the following
16 events occur after the Compliance Date:

17 (a) Proposition 65 is preempted by federal law, or determined to conflict with
18 mandatory federal food labeling requirements, with respect to warnings
19 concerning the presence of acrylamide in the Covered Product, whether by
20 statute, final regulatory action, executive action, or final judicial decision in
21 which case the Covered Product must comply with applicable federal labeling
22 requirements;

23 (b) a state or federal court permanently enjoins or otherwise bars California from
24 enforcing Proposition 65 warning requirements concerning the presence of
25 acrylamide in the Covered Product;

26 (c) an alternative NSRL for acrylamide in the Covered Product is promulgated
27 (or, if following a prior Alternative NSRL Promulgation, revised) by statute,

1 final regulatory action, or final judicial decision, and Homestat demonstrates
2 that the Covered Product meets the new or revised NSRL for purposes of
3 Health and Safety Code section 25249.10 pursuant to the procedures stated in
4 Section 2.6(a) below;

5 (d) an alternative warning standard or requirement for acrylamide in the Covered
6 Product, for the purpose of compliance with Health and Safety Code section
7 25249.6, is promulgated by statute, final regulatory action, or final judicial
8 decision.

9 2.7 NSRL Compliance ("Warning Exempt") Determination. If Homestat asserts that
10 the Covered Product is Warning Exempt under an Alternative NSRL Determination and Health
11 and Safety Code section 25249.10, but Wilkinson or the California Attorney General dispute this
12 assertion, then the following procedures shall govern:

13 (a) *Determination of Covered Product Level.* If Wilkinson or the California
14 Attorney General cannot reach an agreement with Homestat as to the level
15 of acrylamide contained in the Covered Product ("Covered Product
16 Level") for the purpose of determining whether the Covered Product Level
17 is below the NSRL set by the Alternative NSRL Determination, then the
18 Covered Product Level shall be determined via testing by Medallion
19 Laboratories, based on the serving size and preparation method specified
20 on the packaging of the Covered Product. Homestat shall pay the costs of
21 this testing.

22 (b) *Determination of Other Issues.* If Wilkinson and/or the California
23 Attorney General cannot reach an agreement with Homestat as to whether
24 the Covered Product is Warning Exempt for reasons other than the
25 Covered Product Level, any party may request that this Court determine
26 the issue, subject to the terms of this Consent Judgment.

27 2.8 Communication with the FDA. In the event the FDA contacts Homestat regarding
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1 this Consent Judgment or the provisions herein, Homestat will advise the California Attorney
2 General of the FDA's communication and will send a copy of any of its correspondence with the
3 FDA regarding this Consent Judgment to both the California Attorney General and Plaintiff's
4 counsel.

5 3. ATTORNEYS' FEES

6 3.1 Within thirty (30) days after entry of this Consent Judgment, Homestat shall pay
7 fifty thousand dollars (\$50,000) in lieu of civil penalties to Ross, Dixon & Bell, LLP to cover
8 Wilkinson's attorneys' fees and costs. The above payment shall be delivered via mail or
9 overnight service to Ross, Dixon & Bell, LLP c/o Jason Hartley, Esq., Ross, Dixon & Bell, LLP,
10 550 West B Street, Suite 400, San Diego, California 92101-3599.

11 3.2 Except as specifically provided in this Consent Judgment, Wilkinson and
12 Homestat shall bear their own costs and attorneys' fees.

13 4. ENFORCEMENT OF JUDGMENT/STIPULATED REMEDIES

14 4.1 The terms of this Consent Judgment are enforceable by and among the parties
15 hereto and, with respect to the injunctive relief provided for herein, by the California Attorney
16 General.

17 5. MATTERS COVERED BY THIS CONSENT JUDGMENT

18 5.1 This Consent Judgment is a full, final and binding resolution between Wilkinson,
19 acting on his own behalf and in the public interest pursuant to Health and Safety Code section
20 25249.7(d), and Homestat concerning (a) any violation of Proposition 65 related to any claims
21 made, or which could have been made, in the Notice and/or the Complaint, and (b) any other
22 statutory or common law claim that could have been asserted against Homestat and/or its
23 affiliates, divisions, predecessors, successors, officers, directors, assigns, distributors, retailers,
24 and/or customers for failure to provide clear, reasonable, and lawful warnings of exposure to
25 acrylamide contained in or otherwise associated with the Covered Product. Compliance with the
26 terms of this Consent Judgment resolves any issue, now and in the future, concerning compliance
27 by Homestat and/or its affiliates, divisions, predecessors, successors, officers, directors, assigns,

1 distributors, retailers, and/or customers with the requirements of Proposition 65 with respect to
2 acrylamide contained in or otherwise associated with the Covered Product.

3 5.2 As to any claims, violations (except violations of this Consent Judgment), actions,
4 damages, costs, penalties or causes of action which may arise or have arisen after the original
5 date of entry of this Consent Judgment, compliance by Homestat with the terms of this Consent
6 Judgment shall be deemed to be full and complete compliance with Proposition 65 as to claims
7 regarding exposure to acrylamide in the Covered Product.

8 5.3 In furtherance of the foregoing, Wilkinson hereby waives any and all rights and
9 benefits which he now has, or in the future may have, conferred upon him with respect to the
10 Covered Product by virtue of the provisions of Section 1542 of the California Civil Code, which
11 provides as follows:

12 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
13 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
14 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
15 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
16 THE DEBTOR."

17 Wilkinson understands and acknowledges that the significance and consequence of this waiver of
18 California Civil Code Section 1542 is that even if Wilkinson suffers future damages arising out
19 of or resulting from, or related directly or indirectly to, in whole or in part, the Covered Product,
20 he will not be able to make any claim for those damages against Homestat, or its affiliates,
21 divisions, predecessors, successors, officers, directors, or assigns, or any of its customers,
22 distributors, wholesalers, retailers or any other person in the course of doing business who may
23 manufacture, use, maintain, distribute, market or sell the Covered Product. Furthermore,
24 Wilkinson acknowledges that he intends these consequences for any such claims which may exist
25 as of the date of this release but which Wilkinson does not know exist, and which, if known,
26 would materially affect his decision to enter into this Consent Judgment, regardless of whether
27 his lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

1 6. SERVICE ON THE CALIFORNIA ATTORNEY GENERAL

2 6.1 Within five days of the date that this Consent Judgment is signed by both parties,
3 or concurrently with service of a motion for judicial approval of settlement pursuant to Health &
4 Safety Code Section 25249.(7)(f)(4), whichever is sooner, Wilkinson will serve a report of
5 settlement on the California Attorney General pursuant to 11 California Code of Regulations
6 ("CCR") §3003. The motion for approval of this Consent Judgment shall be served on the
7 Attorney General no later than 45 days prior to the date set for hearing on the motion.

8 7. APPLICATION OF JUDGMENT

9 7.1 The obligations of this Consent Judgment shall apply to and be binding upon
10 Wilkinson, any and all plaintiffs acting in the public interest pursuant to Health and Safety Code
11 section 25249.7(d), Homestat, and the successors or assigns of any of them.

12 8. MODIFICATION OF JUDGMENT

13 8.1 This Consent Judgment may be modified only upon written agreement of the
14 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
15 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

16 9. NOTICE

17 9.1 When a party is entitled to receive any notice or communication under this
18 Consent Judgment, the notice shall be sent by U.S. mail or overnight delivery service as follows:

- 19 (a) *For Wilkinson:* Jason Hartley, Esq., Ross, Dixon & Bell, LLP, 550 West
20 B Street, Suite 400, San Diego, California 92101-3599; and
21 (b) *For Homestat:* Bill Stadtlander, Homestat Farm Ltd., 6065 Frantz Road,
22 Suite 206, Dublin, Ohio 43017, with a copy to Richard C. Coffin, Barg
23 Coffin Lewis & Trapp, LLP, One Market, Steuart Tower, Suite 2700, San
24 Francisco, California 94105.

25 9.2 Wilkinson or Homestat may modify the person and address to whom notice is to
26 be sent by sending the other party notice in accordance with this Paragraph.

27 10. AUTHORITY TO STIPULATE

1 10.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
2 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
3 of the party represented and legally to bind that party.

4 11. RETENTION OF JURISDICTION

5 11.1 This Court shall retain jurisdiction over the matters covered herein and the
6 enforcement and/or application of this Consent Judgment.

7 12. DISMISSAL OF ACTION

8 12.1 Subject to the reservation of jurisdiction in Paragraph 11.1, the Complaint, the
9 legal action arising from the Complaint, and all claims therein are dismissed with prejudice.

10 13. ENTIRE AGREEMENT

11 13.1 This Consent Judgment contains the sole and entire agreement and understanding
12 of the parties with respect to the entire subject matter hereof, and any and all prior discussions,
13 negotiations, commitments and understandings related hereto. No representations, oral or
14 otherwise, express or implied, other than those contained herein have been made by any party
15 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
16 deemed to exist or to bind any of the parties.

17 14. GOVERNING LAW

18 14.1 The validity, construction and performance of this Consent Judgment shall be
19 governed by the laws of the State of California.

20 15. ENFORCEMENT

21 15.1 The prevailing party in any dispute arising out of, relating to, or in connection
22 with this Consent Judgment shall recover its reasonable costs and attorney's fees, except that this
23 Consent Judgment shall not be interpreted to authorize an award of such costs or fees against the
24 California Attorney General, unless such an award is also authorized by existing California or
25 federal law.

26 16. COURT APPROVAL

27 16.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
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AT LAW

1 effect, and cannot be used in any proceeding for any purpose.

2 IT IS SO STIPULATED:

3
4 DATED: 1-5-07

By: Robert O. Wilkinson

5 Position: _____

6 For Plaintiff Robert Wilkinson

7
8
9 DATED: _____

By: W. H. Hartman Jr.

10 Position: PRESIDENT

11 For Defendant Homestat Farm, Ltd..

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14 IT IS SO ORDERED, ADJUDGED AND DECREED:

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16 Dated: JAN 11 2007

RONALD S. PRAGER

JUDGE OF THE SUPERIOR COURT

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AT
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[PROPOSED] CONSENT JUDGMENT

San Diego Superior Court Case No. Case No. GIC864017

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